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IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

May Term, 1917

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

BRIEF OF PLAINTIFF-DEFENDANT IN ERROR

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION.

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STATEMENT OF CASE.

This appeal arises from an indictment found by the Grand Jury of the Territory of Alaska, Third Division, and filed in the District Court of said Territory and Division on October 14, 1914, for violation of Section 266, Compiled Laws of Alaska of 1913, page 197, which indictment is as follows:

"The Alaska Packers Association, a corporation, is accused by the grand jury of the Territory of Alaska, Division Number Three, by this indictment, of the crime of Wanton Waste of Salmon, committed as follows:

The said Alaska Packers Association, on the

thirtieth day of July, nineteen hundred and thirteen, in the Territory and Division aforesaid, being then and there a corporation organized and existing under the laws of the State of California, unlawfully and wantonly did waste and destroy a large number of salmon, which salmon then and there had been taken and caught in the waters of Alaska, to-wit, at a point in the waters of Cook Inlet, near the western shore of said Inlet between the mouth of the Kuskatan River, and the West Foreland in said Territory and Division, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Seward, in the Territory and Division aforesaid, the fourteenth day of October, nineteen hundred and fourteen." (Transcript of Record, page 4.)

Thereafter motion to set aside and quash said indictment and a demurrer thereto were filed by the defendant both of which were overruled by said District Court on April 2, 1915. A trial of said cause was called and had in said District Court on September 16, 1916, before a jury regularly empaneled, which trial resulted in a verdict of guilty brought in by said jury, and thereafter after a motion for arrest of judgment and for a new trial had been denied the court on October 14, 1916, pronounced sentence and judgment against the defendant by the imposition of a fine of Two Hundred ($200.00) Dollars, said fine to include all costs.

The indictment as will be seen fixed the 30th day

of July, 1913, as the date of the commission of the offense, and the court after admitting testimony on behalf of the prosecution of the wanton waste and destruction of salmon on several days in the latter part of July, 1913, and also in the early part of August, 1913, compelled the prosecution to elect to fix a date for the commission of the offense, which election made by the prosecution fixed as said date the 28th day of July, 1913.

The instructions given to the jury by the Court at the conclusion of the testimony and after argument by the respective counsel were as follows:

INSTRUCTIONS OF THE COURT.

'*Gentlemen of the Jury*:

In this case the defendant, the Alaska Packers' Association, a corporation, is charged by the indictment with wantonly wasting and destroying salmon in the waters of Cook Inlet, in the Third Division of Alaska, on the 30th day of July, 1913.

2.

Section 266 of the Compiled Laws of Alaska provides that it shall be unlawful for any person, company or corporation wantonly to waste or destroy salmon, or other food fishes, taken or caught in any of the waters of Alaska.

You are instructed that while intent is an essential ingredient of every crime and that no crime can be committed without the intent so to do, still everyone is presumed to know and to intend the necessary, natural and probable consequences of his acts.

The word "Wantonly," as used in this statute, means without excuse or justification; having a reckless disregard of consequences; heedless of results and the rights of others.

The words "waste" and "destroy" are used in this statute in their ordinary significance—to suffer or permit to go to waste and be destroyed; not saved or put to any good or useful purpose.

3.

Section 265, Compiled Laws of Alaska, reads as follows:

It shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed.

4.

It is admitted that the defendant is a corporation organized under the laws of the State of California, and you are instructed that a corporation acts only through some officer, agent, representative or person, and you are further instructed that the witness Williams is admitted to be the superintendent of said defendant corporation, and as such, his acts and agreements in relation to the trap and fish testified to in this case are binding on said defendant company.

At the request of the defendant I give you the four instructions following:

Defendant's Instruction A.

The indictment in this case charges the defendant with destroying a large number of salmon. Now you are instructed that before the defendant can be

convicted of the charge it must be proven to your satisfaction, beyond all reasonable doubt, that the defendant unlawfully and wantonly wasted or destroyed a large number of salmon, that is, a considerable number. To sustain a conviction of the defendant it is not sufficient to prove that some salmon were wasted or destroyed, such as might incidentally be wasted and destroyed in the operation of a large cannery.

Defendant's Instruction B.

This instruction is given subject to the qualifications mentioned in Instruction Number 8.

You are instructed that if you believe from the evidence that at the time the defendant corporation supplied Hunter and March with a portion of the fishing gear for the construction of the trap at West Foreland, that Captain Williams acting on behalf of said corporation stated to Hunter that in case the company did not take all of the fish that would be caught in the trap that he, Hunter, must take care of the fish, either by salting or drying them and not permit them to spoil, then you must find the defendant not guilty.

Defendant's Instruction C.

This instruction is given subject to the qualifications mentioned in Instruction Number 8.

I instruct you that if you believe from the evidence that at the time the defendant corporation delivered to Hunter a portion of the gear used in connection with the fishing-trap in question that it was understood between Captain Williams, acting for the defendant corporation, and William Hunter, that in

case the company's boat did not call for any fish within the time allowed by law for canning fish after they were taken from the water, that Hunter and March were to dry or salt the fish for their own account, then you must find the defendant Not Guilty.

As I have stated, these last two instructions that I have read to you are to be read in connection with Instruction Number 8 as I will read it to you hereafter.

Defendant's Instruction D.

The defendant in this case is a corporation, but you are cautioned not to allow such fact to prejudice or bias you in this case either in favor of or against the defendant. You are instructed to consider the evidence in this case in the same manner as you would if the defendant were an individual.

5.

The Jury are instructed that although the indictment in this case charges the unlawful destruction of salmon to have been committed on the 30th day of July, 1913, plaintiff has elected to stand for conviction upon another date, towit, the 28th day of July, 1913, and you are instructed that the plaintiff can do this, and you are to consider the charge as though the indictment charged the commission of the offense to have occurred on said 28th day of July, 1913.

There has been some evidence introduced of other like offenses on other dates. The evidence was admitted only as showing a long course of conduct and as it may tend to throw light on and explain the whole

situation, or transaction, between the defendant and the prosecuting witness, or the witness March, and for the purpose of showing the intent, purpose or motive of the defendant, whether wanton, reckless or otherwise, as concerns the offense charged to have been committed on the said 28th day of July, 1913.

And you are instructed that you will not consider the evidence of other offenses than that alleged to have been committed on the 28th day of July, 1913, as proving the alleged offense, if you find it was committed on said last-named date, but only such evidence may tend to show motive, intent and purpose as above set forth.

7.

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant company made an agreement or arrangement with the witness March, or March and Hunter, to call for and take all salmon caught in said trap near Kuskatan, during the fishing season of 1913, and that said defendant recklessly and wantonly (as defined to you in these instructions) failed and neglected to call for or take said fish and thereby suffered and permitted said salmon to be wasted and destroyed, then you should find the defendant guilty as charged in the indictment.

If, however, you believe from the evidence that the defendant company did not agree to call for all the salmon during the fishing season of 1913, at said trap near Kuskatan and take the same from the witness March, or March and Hunter, then you should

find the defendant Not Guilty.

The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the trapping or catching of salmon, to-wit:

8.

A cannery company may lawfully enter into a contract with any person to take all or any part of the salmon caught in a trap or otherwise by such person, providing such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract cannot lawfully be made so as to relieve such cannery company from liability if said cannery company, in making said contract, has knowledge that such person is using a trap which during the run of salmon will catch large numbers of salmon each tide, and such person has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable portion thereof, will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away, wasted and destroyed in consequence.

9.

In this case, as in all criminal cases, the jury and the Judge of the Court have separate functions to perform. It is your duty to hear all the evidence, all of which is addressed to you, and thereupon to decide and determine the questions of fact arising from the evidence. It is the duty of the Judge of this Court to decide the questions of law involved in the trial of the case, and the law makes it your duty to accept as law what is laid down as such by the Court in these instructions. But your power of judging the effect of the evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.

10.

Your duty to society and this defendant obligates each of you to give your earnest and careful attention and consideration to every feature of the case now on trial before you, so that the defendant may not be unjustly convicted nor wrongfully acquitted. Under the solemnity of your oaths as jurors you must consider all of the evidence in the case under the law given to you by the Court in these instructions; and upon the law and evidence you must reach, if you can, a just verdict, which the law and the rights of the defendant demand of you; and in determining the guilt or innocence of the defendant it becomes your duty to accept the law of the case as given to you by the Court in these instructions.

11.

It is your duty to give to the testimony of each

and all of the witnesses such credit as you consider their testimony justly entitled to receive; and in doing so, you should not regard the remarks or expressions of counsel, unless as the same are in conformity with the facts proved, or are reasonably deducible from such facts and the law as given to you in these instructions.

12.

You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict; and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust.

13.

You are instructed that you should not consider any evidence sought to be introduced but excluded by the Court, nor should you consider any evidence that has been stricken from the record by the Court, nor should you consider in reaching your verdict any knowledge or information known to you not derived from the evidence as given by the witness upon the witness stand.

You should not allow prejudice or sympathy to swerve you in reaching a verdict according to the evidence and the law as given you by the Court. Whatever verdict is warranted under the evidence and the

instructions of the Court, you should return, as you have sworn so to do.

The character and degree of the punishment is to be determined by the Court, within the limits fixed by law and you are instructed that you should not consider the matter of the punishment in making up your verdict.

14.

You are instructed that you are the sole judges of the credibility of the witnesses appearing before you, and of the reasonableness of their testimony, and of the weight to be given their evidence.

The law also makes it my duty to instruct you that you are not bound to find in conformity with the testimony of any number of witnesses which does not produce conviction in your minds, against a less number, or against a presumption of other evidence, satisfying your minds. You are also instructed that a witness who is wilfully false in one part of his testimony may be distrusted by you in other parts. If you find that any witness in this case has testified falsely in one part of his testimony, you are at liberty to reject all or any part of his testimony, but you are not bound to do so. You may reject the false part and give such weight to other parts as you think they are entitled to receive.

15.

This defendant is presumed to be innocent of the charge against it until it is proved to be guilty beyond a reasonable doubt by the evidence produced in this case and submitted to you. This presumption of in-

nocence is a right guaranteed to the defendant by law and remains with it, and should be given full force and effect by you, until such time in the progress of this case as you are satisfied of its guilt from the evidence beyond a reasonable doubt.

You are instructed that the indictment in this case is not to be taken or considered by you as any evidence against the defendant, but as merely a charge or allegation brought against it.

16.

The term "reasonable doubt" as defined by the law and as used in these instructions means that state of the case which, after a careful comparison and consideration of all the evidence in the case, leaves the minds of the jury in that condition that they cannot feel an abiding conviction, amounting to a moral certainty, of the truth of the charge. The term "reasonable doubt" does not mean every doubt but such a doubt must be actual and substantial, as contradistinguished from some vague apprehension and must arise from the evidence, or from the want of evidence, or from such sources. A reasonable doubt is not a mere whim, but is such a doubt as arises from a careful and honest consideration of all the evidence in the case; and the evidence is sufficient to remove all reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon the conviction without hesitancy in their own most important affairs. Proof beyond all reasonable doubt does not mean proof beyond every doubt. Absolute certainty

in the proof of a crime is rarely obtainable, and never required.

17.

I hand you herewith two forms of verdict, one finding the defendant guilty as charged in the indictment, and the other finding the defendant not guilty.

You may take with you these instructions for your guidance, and when you have unanimously agreed upon your verdict, you will sign the one you find, by your foreman, and return it into court; the other you will destroy." (Transcript of Record, pages 119 to 129.)

QUESTIONS INVOLVED.

The principal points raised by the assignments of error made by the defendant-plaintiff in error may succinctly be resolved as follows:

First: Insufficiency of the Indictment raised by the defendant's demurrer especially in the following particulars: "That the acts and omissions charged are not set forth in such a manner as to enable a person of common understanding to know what is intended," and "That said indictment is defective because of ambiguity, duplicity, multifariousness, and because the same is involved and lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts, or the character of the evidence which it will be required to meet upon the trial of the specific charge attempted to be made."

Second: That error was committed by the Court in permitting the plaintiff-defendant in error

at the conclusion of the introduction of the Government testimony to elect July 28, 1913, as the date of the commission of the offense, and in not compelling the election of July 26, 1913, by implication of law.

Third: That error was committed by the Court in denying defendant's motion to the effect that Hayward March and William J. Hunter were independent contractors, and that the testimony disclosed that the trap alleged to be operated by them was entirely under their control, and that therefore defendant was not liable for any destruction or waste of fish at said trap.

Fourth: That the witnesses for the Government, Hayward March and William J. Hunter were accomplices in the commission of the crime charged against the defendant, and the jury should have been instructed as to the necessity of corroboration.

Fifth: That the Court erred in the definition in his instructions to the jury of what constituted a wanton waste of fish and as to the meaning of the word "wantonly."

POINTS AND AUTHORITIES.

The indictment followed the language of the statute and gave sufficient particulars to apprise the defendant of the offense charged, so preparation could be made for defense and to enable defendant to use it as a plea of former jeopardy.

Sections 2147 and 2149 Compiled Laws of Alaska, 1913.

United States v. Fitzpatrick, 178 U. S. 308.

United States v. Jackson, 102 Fed. 473.

United States v. Stockslager, 116 Fed. 590.

United States v. Booth, 197 Fed. 283.
United States v. Potter, 155 U. S. 438.
State v. Spencer, 6 Or. 153.
State v. Brown, 7 Or. 199.
State vs. Dilley, 15 Or. 73, 13 Pac. 648.
State v. Childers, 32 Or. 122, 49 Pac. 801.
State v. Ah Lee, 18 Or. 540, 23 Pac. 424.

Evidence of other offenses admissible to show intent, purpose, motive, knowledge and shed light on the whole situation.

Kettenbach v. United States, 202 Fed. 383.
United States v. Lillis, 190 Fed. 530.
United States v. Dillard, 141 Fed. 303.
United States v. Jones, 179 Fed. 584.
United States v. Jones, 162 Fed. 417.
United States v. Van Gesner, 153 Fed. 46.
12 Cyc. 407.

That no error was committed in permitting the prosecution to elect July 28, 1913, as the date of the commission of the offense charged, and that under the testimony and circumstances of the case, the court was invested with discretion as to the date of election, and there was no abuse thereof.

Bishop's Criminal Procedure (Second Edition 1913), Vol. 1, Section 461, paragraph 4.
State v. Parish, 104 N. C., 10 S. E. 457.
State v. Harris, 154 Pac., 198.
State v. Poull, 105 N. W. 717.
Angeloff v. State, 110 N. E. 936.
Carter v. State, 181 S. W. 473.
State v. Roby, 150 N. W. 793.
State v. Schueller, 120 Minn. 26, 138 N. W. 937.
State v. Acheson, 91 Me. 240, 39 Alt. 570.
State v. Hughes, 35 Ala. 351.
State v. Smith, 22 Vt. 74.
Com. vs. O'Connor, 107 Mass. 219.
State v. Stockwell, 27 Ohio St. 563.
Rex. v. Hart, 7 Car. & P. 652 .

State v. Bartley, 53 Neb. 310, 73 N. W. 744.
State v. Simms, 10 Tex. Ap. 131.
State v. Long, 56 Ind. 182.
State v. Sims, 3 Strob. 137.
Rex. v. Galloway, 1 Moody 234.
Reg. v. Braun, 9 Cox C. C. 284.
Com. v. Pierce, 11 Gray, 447.
State v. Shores, 31 W. Va. 491.
State v. Carragin, 210 Mo. 351, 109 S. W. 553.

Where evidence is directed to one particular class of offenses under a statute and no other is admitted, there need be no election.

People v. Leonard, 81 Ill. 308.

Where an offense is continuous in its nature, evidence with regard to its commission at different times within the general charge does not demand an election.

State v. Etress, 88 Ala. 191, 7 So. 49.
State v. Owens, 74 Ala. 401.
Com. v. Sullivan, 146 Mass. 142.
People v. Elmer, 109 Mich. 493.

Where distinct criminal acts form a series which is readily susceptible of proof, while proof of any particular act might be difficult, it is held that the State need not elect.

State v. Higgins, 121 Iowa 19.
State v. Memmler, 75 Ga. 576.

The claim that March and Hunter were independent contractors, in the operation of the trap, thereby exempting defendant corporation from liability for wanton waste of fish untenable, for the reason defendant could not enter into any contract which would necessarily contemplate the violation of the law.

Carico v. West Va. Central & P. Ry. Co., 39 W. Va., 86, 19 S. E. 571, 24 L. R. A. 50.
Covington & C. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 375.
St. Louis & S. F. R. Co. v. Madden, 17 L. R. A. (N. S.) 791 with cases cited.
Fowler v. Saks, 7 L. R. A. 653.
26 Cyc. 1557 *et seq.*
Colgrove v. Smith, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590.
Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213.
Ackles v. Pac. Bridge Co., 66 Or. 110, 133 Pac. 781.

March and Hunter were not accomplices; did not aid, assist, advise, or encourage in the commission of the crime charged, or have any corrupt co-operation therein.

Definition of and general rule for determining who is an accomplice.

United States v. Holmgren, 156 Fed. 444.
People v. Bolanger, 71 Cal. 19.
Wharton Crim. Evidence 440.
State v. Clapp, 94 Tenn. 186.
State v. Roberts, 15 Or. 197.
State v. Umble, 115 Mo. 461.
State v. Keller, 102 Ga. 511.
1 Am. & Eng. Ency. Law (2nd Ed.) 389.
State v. Collum, 122 Cal. 186.
State v. Giles, 43 Tex. Crim. App. 563.
People v. Coffey, 39 L. R. A. (N. S.) 707.
State v. Duff, 144 Iowa 142; 122 N. W. 829; 138 Am. St. Rep. 274 with large note.
United States v. Diggs, 220 Fed. 545.
State v. Stone, 85 S. W. 808.

Definition of word "wantonly" in instructions of Court was broad, and is more than sustained by authorities.

Strough v. Central Ry. Co. of New Jersey, 209 Fed. 26.
Hazle v. Railroad Co., 173 Fed. 431.
Natl. Folding Box Co. v. Robertson's Estate, 125 Fed. 524.
Cleveland C. C. & St. L. Ry. Co. v. Tartt, 64 Fed. 823.
Conchin v. El Paso & S. W. Ry. Co., 108 Pac. 260.
Kelly v. Stewart, 93 Mo. App. 47.
State v. Brigham, 94 N. C. 888.
Ex Parte Birmingham Realty Co., 63 So. 67.
Seago v. Paul Jones Realty Co., 170 S. W. 372.
Merrill v. Sheffield Co., 53 So. 219.
Adler v. Marit, 59 So. 597.
Vessel v. Seaboard Air Line Co., 62 So. 180.
Tolleson et al. v. Southern Ry. Co., 70 S. E. 311.
Cobb v. Bennett, 75 Pa. St. 326.
Welch v. Durand, 36 Conn. 182.

ARGUMENT.

SUFFICIENCY OF THE INDICTMENT.

The first matter for discussion in this appeal is the sufficiency of the indictment, and we claim that under the statutes of Alaska, a slight examination of said indictment will demonstrate its sufficiency.

It will be admitted that the requirements of an indictment will be governed by the procedure as provided by the Compiled Laws of Alaska of 1913.

United States v. Summers, 231 U. S. 137.
United States v. John Wigger, 235 U. S. 276.

Section 2147 of said Compiled Laws provides as follows:

"Sec. 2147. That the indictment must contain:

First. The title of the action, specifying the

name of the Court to which the indictment is presented and the names of the parties.

Second. A statement of the facts constituting the offense in ordinary and concise language without repetition, and in such manner as to enable a person of common understanding to know what is intended."

Section 2149 of the same compilation, reads as follows:

"Section 2149. That the manner of stating the act constituting the crime, as set forth hereinafter, is sufficient in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit."

The forms prescribed as referred to are of the simplest kind, and in each case nearly follow the statutory language defining the crime. These sections of the Compiled Laws were taken from Oregon, and are the same as referred to in the Alaska case of *United States v. Fitzpatrick* 178 U. S. 306, which says referring to the Section of the Oregon Code from which Section 2147 of the Compiled Laws of Alaska was copied, "This section was doubtless intended to modify to a certain extent the strictness of the common law indictment, and simply to require the statement of the elements of the offense in language adapted to the common understanding of the people, whether it would be regarded as sufficient by the rules of the common law or not." That was a case of murder, and the Court after a further discussion of the criticism aimed at the indictment, said "we are bound to give some effect to the provisions of Section 1268 (Sec. 2147, Alaska Code) in its evident purpose to

authorize a relaxation of the extreme stringency of criminal pleadings, and make that sufficient in law which satisfied the 'common understanding' of men." If the simple, direct manner of charging a crime of the enormity of murder, provided by the code is sufficient, surely no greater certainty can be demanded in the case of a misdemeanor as involved in the indictment under discussion, especially as Section 2149 provides that "in other cases forms may be used as nearly similar as the nature of the case will permit." There is no form, of course, prescribed for an indictment for the violation of the law in the present instance, but it will be sufficient if it follows the lines of the other simplified forms of the Alaska code.

As the case of *United States v. Fitzpatrick* (*supra*) directs attention to the Oregon law and the interpretation thereof by the highest court of that State for the requisites of an indictment, the following Oregon cases hold that the simplified forms given in the statute are sufficient in cases covering various violations of the criminal law of that state.

State v. Ah Lee, 18 Ore. 540, 23 Pac. 424.
State v. Childers, 32 Or. 122, 49 Pac. 801.
State v. Dilley, 15 Or. 73, 13 Pac. 648.
State v. Spencer, 6 Or. 153.
State v. Brown, 7 Or. 199.
State v. Lee Yan Yan, 10 Or. 366.

The law upon which the present indictment is based is Section 266, on page 199, of the Compiled Laws of Alaska, 1913, as follows:

> "That it shall be unlawful for any person, company or corporation wantonly to waste or destroy salmon or other food fishes taken or caught

in any of the waters of Alaska."

An inspection of the indictment will show that it alleges that the defendant is a corporation organized under the laws of the State of California, that on the 30th day of July, 1913, it unlawfully and wantonly did waste and destroy a large number of salmon, which salmon then and there had been taken and caught in the waters of Alaska, to-wit, at a point in the waters of Cook Inlet near the western shore of said Inlet between the mouth of the Kustatan River, and the West Foreland in said Territory.

It will be seen that it makes a definite charge under the language of the Statute, fixing the place, time and number of fish destroyed and under all the requirements of the Oregon cases and the Fitzpatrick case (supra), it furnishes the accused with a definite description of the offense so as to enable it to avail itself of the plea of former jeopardy and to inform the Court whether the facts were sufficient in law to support a conviction.

This Court held that the crime may be charged in the language of the Statute in the following cases:

United States v. Jackson, 102 Fed. 473.

United States v. Stockslager, 116 Fed. 590,

and in

United States v. Booth, 197 Fed. 283

this Court has given an emphatic approval of directness and simplicity in criminal pleading.

Even in the United States Courts not governed

by the simplified procedure as controls in this case, the following language was employed in *United States v. Potter* 155 U. S. 443, by Justice Brewer in describing the essentials of an indictment for a statutory offense:

"The offense charged is a statutory one, and while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing such an offense (*U. S. v. Carll*, 105 U. S. 611) yet if such language is according to the natural import of the words fully descriptive of the offense, then ordinarily it is sufficient."

There can be no mistake of the clear import of the words employed in this statute that it shall be unlawful wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska, and when the kind, number, and place are described there can be, it seems to us, no doubt of the sufficiency of the indictment.

In these later days both statutes and courts have recognized the necessity and reasonableness of relaxing the rigidity of the ancient requirements of criminal pleading, and have in passing on indictments been governed by the rule that while the accused should be fairly apprised of the charge, so that intelligent preparation may be made to meet it, and so that one would be enabled afterwards to use it as a shield, still hypercritical objections, unimportant defects, and even im-

perfection of statement which do not reasonably tend to prejudice the accused should be ignored and disregarded.

In view of this reasonable standard fixed for indictments and of its positive recognition made by Sections 2147 and 2149 of the Alaska Code, there is no merit to the objection made to the indictment in the present instance.

ELECTION OF THE DATE OF OFFENSE.

The next matter urged by the defendant as error was in the trial of the cause, which took place on September 16, 1916, in the election made by the prosecution of the date upon which to rely for the commission of the offense, which date was fixed as July 28, 1913, the alleged error being raised by various motions and exceptions on the part of the defendant.

At the trial, the prosecution introduced as witnesses to sustain the charge, Hayward March and William J. Hunter, whose testimony of the fish wasted and destroyed will be seen by reference to the transcript of evidence. That testimony shows that a varying number of fish were wasted and destroyed on several days beginning with July 26, 1913, and continuing up to August 8, 1913, on account of the failure of the defendant to send its boat to convey the fish to its cannery.

Objections were made by counsel for the defendant to the introduction of this testimony, showing the number of salmon wasted and thrown away on

different dates, on various grounds, that the government should be confined to the date alleged in the indictment, the 30th day of July, 1913, and that after the introduction of the first evidence tending to show a wanton waste and destruction of fish, on the 26th day of July, 1913, the government had elected as a matter of law that date for the commission and should not be permitted to introduce evidence of collateral crimes. The Court ruled at that stage of the proceedings concerning the introduction of such testimony as follows:

> "The Court—The evidence will be received for the purpose of throwing light on this agreement between the defendant company and the prosecuting witness, showing their methods or manner of getting these fish.
>
> Mr. Donohoe—I understand the ruling of the Court to be that evidence will go to the jury covering the period of time during which any fish were wasted there as testified to by the witness.
>
> The Court—Testimony will be introduced showing the entire operation of this trap, as tending to throw light on the charge in this case, that on a certain day they were wasted, showing the methods used and the calling of defendant's boats or their not calling, as the case may be and showing the entire circumstances, so it can be ascertained whether they did use reasonable diligence and care in the protection of these fish or whether they wantonly and recklessly wasted and permitted them to be destroyed—that is the question here." (Transcript of Record, pages 47 and 48.)

Then again before the plaintiff closed its case,

the Court concerning the matter ruled as follows:

"By the Court—Before the plaintiff closes its case, I think it should be required to elect on what date it will stand for a conviction in this case, on what date it will elect to try the charge of wanton destruction of fish and the jury will be instructed that the testimony of other and similar offenses on other dates is admitted only for the purpose of explaining the entire situation or transaction and for the purpose of showing the intent and motive with which the defendant acted in the matter of the charge when the offense relied upon for a conviction was committed, if committed at all. Now, if you will elect what date you desire to stand on, Mr. Munly—

Mr. Munly—Since the Court has announced the law in the case to that extent, I will elect the 28th day of July, 1913, to stand upon.

By the Court—Very well.

Mr. Donohoe—The defendant excepts to the election made by the Government at this stage of the trial, our contention being that the election should have been made at the commencement of the trial.

Mr. Munly—On account of being required to make that election, I have no further evidence to introduce. The State will rest unless the witnesses are recalled for rebuttal.

Mr. Donohoe—At this time the defendant moves the Court to strike out of the record the testimony regarding the waste or destruction of salmon at or near the place mentioned in the indictment, at any day subsequent to the 28th day of July, 1913, on the ground that it is incompetent, irrelevant and immaterial testimony.

By the Court—The objection will be overruled, or rather the motion will be denied and exception allowed. The jury will be instructed as to the effect of that evidence, that it is not for the purpose of proving the offense alleged to have

been committed on the 28th day of July, 1913, but only as it tends to show a general course of conduct and going to explain or show the motive or intent with which the defendant acted. (Transcript of Record, pages 85 and 86.)

Finally in the instructions to the jury, the Court on this same matter, gave the following instruction:

"The Jury are instructed that although the indictment in this case charges the unlawful destruction of salmon to have been committed on the 30th day of July, 1913, the plaintiff has elected to stand for a conviction upon another date, to-wit, the 28th day of July, 1913, and you are instructed that the plaintiff can do this, and you are to consider the charge as though the indictment charged the commission of the offense to have occurred on said 28th day of July, 1913.

There has been some evidence introduced of other like offenses on other dates. The evidence was admitted only as showing a long course of conduct and as it may tend to throw light on and explain the whole situation, or transaction, between the defendant and prosecuting witness, or the witness March, and for the purpose of showing the intent, purpose or motive of the defendant, whether wanton, reckless or otherwise, as concerns the offense charged to have been committed on the said 28th day of July, 1913.

And you are instructed that you will not consider the evidence of other offenses than that alleged to have been committed on the 28th day of July, 1913, as proving the alleged, if you find it was committed on said last-named date, but only as such evidence may tend to show motive, intent and purpose as above set forth." (Transcript of Record, pages 122 and 123.)

The defendant contends that the testimony shows that July 26, 1913, was first date upon which a large number of salmon were wasted, and as a matter of

law it is contended the election was irrevocably fixed by said testimony.

The prosecution on the other hand contends that inasmuch as what constitutes a large number of fish was a matter of uncertainty and was to be determined by the jury, under the instructions of the Court, it was within the discretion of the Court to permit the election as made, if an election was necessary at all.

The prosecution maintains further at the outset, that the testimony admitted by the Court of the waste of fish on the various days was entirely proper and admissible under the sound principles of the law of evidence announced at the time by the Court, to the effect that said testimony was for the purpose of showing the entire operation of the trap, as tending to throw light on the charge in the case, showing the methods used and the calling of defendant's boats or their not calling, and showing the entire circumstances, so that it could be ascertained whether they did use reasonable diligence and care in the protection of the fish or whether they wantonly and recklessly permitted them to be destroyed, further as showing the entire situation and the motive, purpose, and intent with which the defendant acted.

Nothing is better established in the law of evidence than that evidence showing intent, purpose, motive and knowledge is proper and admissible even though such evidence may tend to show or establish the commission of an additional or separate offense. See

United States v. Kettenbach, 202 Fed. 382.

United States v. Lillis, 190 Fed. 530.
United States v. Dillard, 141 Fed. 303.
United States v. Jones, 179 Fed. 584.
United States v. Jones, 162 Fed. 417.
United States v. Van Gesner, 153 Fed. 46.
United States v. Lobosco, 183 Fed. 742.
12 Cyc, 407.

The Court's view of the law of the case concerning the quantity of fish that would constitute a violation of the law may be found in the instructions to the effect that before the jury would be warranted in convicting the defendant it would be necessary that the Government should prove beyond a reasonable doubt "that the defendant unlawfully wasted and destroyed a large number of salmon, that is, a considerable number." (Transcript of Record, page 121.) This is the theory of the case as held all through the proceedings, and the prosecution was entitled therefore to unfold the different testimony as to the waste of fish on the ground of preliminary inquiries and when required to elect, to make the election of the date which would tend to establish the commission of the offense. If compelled to elect on any of the alleged earlier infractions of the law, on account of the uncertainty of the quantity destroyed necessary to constitute a crime, the Government might have no case at all and might have run the risk of an instructed verdict for the defendant. Under such circumstance, it would appear that it was properly a matter of discretion for the trial Court to permit the Government to make the election which was made, and in doing so there was no abuse of the discretion lodged

in the court under the law and under the circumstances.

Discussing the law concerning the election of dates, there is a great deal of diversity and lack of uniformity of judicial opinion, but Bishop in his New Criminal Procedure (Second Edition 1913) Vol. 1, Section 461, in paragraphs 4 and 5, gives about the clearest and ablest analysis of the various decisions and conclusions in regard thereto that have come under our observation. Bishop says:

> "In other words, ———PRELIMINARY INQUIRIES OF WITNESSES,—and a production of evidence not definable by rule, but determined by the judicial discretion in each particular instance, must first be allowed, then the Court on motion will order such an election as it deems just. Here the conflicts of opinion and practice become serious, yet they are in a measure explained by the differing circumstances of cases. Some appear to hold that after the government's evidence is all in, it is too late to ask the Court to direct the prosecuting officer to elect. Others deem this the favorite time, or even commend the waiting until the evidence on both sides is in. Another view has in part already appeared: namely, to have the election made at the opening of the cause, in the absence whereof the prosecutor will be held to have elected the first transaction which his evidence tended to prove. In this seeming conflict,———
>
> ON THE WHOLE.———while it is believed that there are some rules of law controlling all cases, in most the question of election is properly and best left to the discretion of the presiding judge, to be exercised with reference to the special facts."

Also see—

State v. Parish, 104 N. C., 10 S. E. 457.

State v. Harris, 154 Pac., 198.
State v. Poull, 105 N. W. 717.
Angeloff v. State, 110 N. E. 936.
Carter v. State, 181 S. W. 473.
State v. Roby, 150 N. W. 793.
State v. Schueller, 120 Minn. 26, 138 N. W. 937.
State v. Acheson, 91 Me. 240, 39 Alt. 570.

As the quantity to make a crime was uncertain, the Court committed no error in permitting the election of July 28, 1913.

That the testimony of the alleged violation of the law on July 26, 1913, was not an election by the government by implication of law, see

State v. Murphy, 9 Lea 373.
State v. Peacher, 61 Ala. 22.
State v. Guettler, 34 Kan. 582.
State v. Brunker, 46 Conn. 327.
State v. Hughes, 35 Ala. 351, 61, 62.

NO ELECTION REQUIRED.

We have discussed this matter of election on the theory that it was a proper case for the Court to require an election, but we are not at all convinced that the Government should have been required to elect. There are various exceptions to the rule requiring an election. For instance, it has been held that where evidence is directed to one particular class of offenses under a statute and no other is admitted, there need be no election.

People v. Leonard, 81 Ill. 308.

Where an offense is continuous in its nature, evidence with regard to its commission at different times

der these several heads of exception to the rule of election. All of the evidence was directed to a particular class and no other, the offense was continuous, and especially does the exception apply that these distinct criminal acts form a series which could be readily proved, while proof of the particular act was difficult. Under the view of the law held by the Court that a considerable number of fish would have to be wasted before a conviction would be warranted, it is difficult to select or elect the one that would come under the construction placed upon the law by the Court, and it was proper therefore to present the whole ser-

Additional cases to be inserted in Brief of the
ted States in case of the United States vs. Alaska
kers Association, No. 2927, pages 29 and 30.

ple vs. Thompson, 212 N.Y. 249, 106 N.E. 78.
This case reverses 161 App. Div., 948,
N.Y.Supp. 1106,
as the appellate Div., in the latter case relied
People vs. Robertson, 84 N.Y.Supp., 401, the case in
N.Y. practically overrules People vs. Flaherty,
N.Y. cited by the plaintiff in error.

also Com. vs. Barnes, 138 Mass. 511 and State vs.
let, 78 Vermont, 157., 62 Atl. 48.

ple vs. Thompson, 212 N.Y.[supra] holds that the
ponderance of judicial opinion now is that acts
sequent [as wellas prior to it] **** are relevant,
ject to the rule that when admissibility of evidence
ends on collateral facts, the regular course is for
trial judge to pass on the facts in the first instance
there if he admits the evidence, to instruct the jur
to its purpose and effect, see 106 N.E. page 79.

We have discussed this matter of election on the theory that it was a proper case for the Court to require an election, but we are not at all convinced that the Government should have been required to elect. There are various exceptions to the rule requiring an election. For instance, it has been held that where evidence is directed to one particular class of offenses under a statute and no other is admitted, there need be no election.

People v. Leonard, 81 Ill. 308.

Where an offense is continuous in its nature, evidence with regard to its commission at different times

within the general charge does not demand an election.

(See cases under Note 45, 22 Cyc. 408.)

"*Etress v. State*, 88 Ala. 191, 7 So. 49 (holding that in a prosecution for carrying concealed weapons, evidence of possession and concealment at different times covered by one continuous act did not require an election); *Owens v. State*, 74 Ala. 401 (trespass after warning); *Com. v. Sullivan*, 146 Mass. 142, 15 N. E. 491 (setting up and promoting lottery); *People v. Elmer*, 109 Mich. 493, 67 N. W. 550 (pretending to tell fortunes)."

And where distinct criminal acts form a series which is readily susceptible of proof, while proof of any particular act might be difficult, it is held that the state need not elect.

22 Cyc., 408 Paragraph E citing *State v. Higgins*, 121 Iowa, 19, 95 N. W. 244.
State v. Memmler, 75 Ga. 576.

This offense of wantonly wasting and destroying salmon and other food fishes would seem to come under these several heads of exception to the rule of election. All of the evidence was directed to a particular class and no other, the offense was continuous, and especially does the exception apply that these distinct criminal acts form a series which could be readily proved, while proof of the particular act was difficult. Under the view of the law held by the Court that a considerable number of fish would have to be wasted before a conviction would be warranted, it is difficult to select or elect the one that would come under the construction placed upon the law by the Court, and it was proper therefore to present the whole ser-

ies of acts, so that the jury might determine which would be regarded as a violation of the law under the instructions of the court. It follows if no election should have been required, the defendant cannot complain of error, and no error could be predicated on the election made for the reason before stated that it was within the discretion of the Court.

CLAIM OF INDEPENDENT CONTRACTOR NOT APPLICABLE.

Another assignment of error is that the witnesses for the Government, Hayward March and William J. Hunter were independent contractors and that the defendant could not be held liable for any wanton waste or destruction of salmon at a trap over which they exercised control. An inspection of the testimony will reveal the terms and nature of the contract.

The testimony of March and Hunter shows substantially that they went to Captain Williams, superintendent of the defendant's cannery at Kasiloff, Alaska, in April, 1913, to make arrangements in regard to the operations of a trap to be established at Kustatan, on the western shores of Cook Inlet, Alaska, and a verbal contract was entered into by which Captain Williams, representing and on behalf of the defendant corporation, agreed to furnish gear, netting and other materials for the construction of the trap, furnish scows as tenders therefor and for the purpose of holding the fish caught in the trap, and further agreed said defendant would call with its boats and take all of the fish of the trap. In accord-

ance with said agreement, the gear, netting, and other materials were furnished March and Hunter, they provided the poles therefor and performed the other work by which said trap was constructed. The defendant corporation provided scows, and upon the completion of the trap, the same was put in operation, and during the run of salmon, in the spring, the boats of the defendant corporation called regularly and took all the fish caught. In the latter part of July, 1913, July 24th, the big run of red fish which is usual to that region commenced, and upon its appearance Mr. Hunter started for the defendant's cannery at Kasiloff, on the morning of July 25th, 1913, and notified the cannery people, although it was not necessary according to the agreement entered into to give said notification. The boats of the defendant which usually called for the fish failed to call for several days to take the fish, and on July 28, 1913, there was some 2,000 fish wasted, both according to March's testimony on page 49 of Transcript of Record and the testimony of Captain Christiansen on behalf of the defendant on page 115 of Transcript of Record.

The witnesses for the prosecution, March and Hunter, positively stated that by the agreement made in the spring with Captain Williams, Superintendent of the defendant corporation, the latter was to take and call for all of the salmon caught in the trap. (See March's testimony on pages 28 and 29 of Transcript of Record, and Hunter's on page 70 thereof). The testimony of Captain Williams in but a slight measure conflicts with this part of the agreement, claim-

ing that the defendant was to take only such fish as they wished. (Direct Testimony, page 90 of Transcript of Record. But see his cross-examination on page 99, of the Transcript of Record, where he rather shuffles away from the question and in answer to the question put to him by the prosecution, does not directly say that he gave March and Hunter instructions about taking care of the surplus fish.)

We claim that under the law in question, to-wit: Section 266 of the Compiled Laws of Alaska, there is a duty imposed on any person, company or corporation, entering into any contract to take precautions to see that the law shall not be broken or disregarded, a duty which cannot be by any means or contract avoided or shifted. Considering for the sake of argument March and Hunter in the operation of the trap in the light of independent contractors, to the general rule exempting employers from liability, for the acts of independent contractors, there are well recognized exceptions. Among these exceptions, it is well recognized that where the law, or regulations, or the nature of the contract, impose a duty or an obligation upon the contractee, he cannot get rid of that duty or discharge that obligation by employing a contractor and shifting and transferring his liability or responsibility on such contractor.

See—

See Carico v. West Va. Central P. Ry. Co., W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.
Fowler v. Saks, 7 L. R. A. 653.
Covington Bridge Co. v. Steinbrock, 76 Am. St. Rep. 375.

St. Louis & S. F. R. Co. v. Madden, 17 L. R. A. (N. S.) 791.
Colgrove v. Smith, 102 Cal. 220, 36 Pac. 44, 27 L. R. A. 590.
Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213.
Ackles v. Pac. Bridge Co., 66 Or. 110, 133 Pac. 781.

These exceptions are set forth in 26 Cyc. commencing on page 1557, and while as there stated there is considerable conflict in authorities as to when the general rule applies and when the case is within the exception, we think under the circumstances surrounding the fishing industry in Alaska and the application of the statute, involved, that the view of the Court as expressed in the following instruction was a clear and eminently reasonable exposition of the law of the case:

> "The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the trapping or catching of salmon, to wit:
>
> A cannery company may lawfully enter into a contract with any person to take all or any such part of the salmon caught in a trap or otherwise by such person, provided such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract cannot be lawfully made so as to relieve such cannery company from liability, if said cannery company, in making said contract, has knowledge that such person is using a trap which during the run of salmon will catch large numbers of salmon each tide, and such person

has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable quantity thereof will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away, wasted and destroyed in consequence." (Transcript of Record page 124.)

If a cannery company could simply make a contract without taking the precautions set forth in the instructions of the Court, it could shift all liability on those operating traps, and if in the heavy runs of fish there were no facilities for taking care of the same, a violation of the law would be invited and tacitly contemplated by such a contract.

There is nothing in the evidence showing that any precautions were to be taken or that any directions were given to take care of the surplus fish. March and Hunter were waiting for the defendant's boats to take the fish to the cannery and when the boats failed to come, and when no facilities had been provided to care for the fish, the result was the waste and destruction.

A contract that would contemplate the operation of a trap like the one in this case, and that would permit a cannery company to call or not with its boats for the fish or to call at uncertain times or according to its pleasure, would be against all reason and would simply be in the nature of a shift to escape liability

for the violation of the statute in this case, which would surely ensue. There is no merit, we therefore contend in this claim of exemption on the ground that March and Hunter were independent contractors, and the Court properly refused the instruction requested by the defendant, giving instead the instruction quoted above, which clearly shows the conditions and limitations that must surround any contract of the nature of the one revealed by the evidence in this case. See *Blanton v. United States*, 213 Fed. 326, for general rules for the refusal of instructions which would be misleading or improper, and also see the cases herein cited on this subject, which refused instructions on the ground of an exemption claimed on the score of the defense that the injury was done by independent contractors.

GOVERNMENT WITNESSES NOT ACCOMPLICES.

A further assignment of error is made that the Government's witnesses, March and Hunter, were accomplices, and that instructions to that effect should have been given by the Court.

An examination of the authorities is therefore pertinent to ascertain the general definition of an accomplice and the general rule for determining who is an accomplice with a view to the application to the present case.

An accomplice has been defined as one who knowingly, voluntarily, and with a common intent with the

principal offender unites in the commission of a crime.

Holmgren v. United States, 156 Fed. 444.
People v. Bolanger, 71 Cal. 19.
Whart. Crim. Evidence, 440.
State v. Clapp, 94 Tenn. 186.
State v. Roberts, 15 Oregon 197.
State v. Umble, 115 Mo. 461.
State v. Keller, 102 Ga. 511.
1 Am. & Eng. Ency. Law (2nd Ed.) 389.

In *State v. Roberts*, 15 Or. 197, the Court gives the following discussion of a definition of an accomplice:

> Webster defines an accomplice to be an associate in crime; a partner or partaker in guilt. Burrill's Law Dictionary defines the term thus: "One of several concerned in a felony; an associate in crime; one who co-operates, aids, or assists in committing it." This term includes all the *particeps criminis*, whether considered in strict legal propriety as principals or accessories.

And Wharton's Criminal Evidence, Volume 1, 10th Edition, Section 440, gives a definition as follows:

> An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime. The co-operation in the crime must be real, not merely apparent. The co-operation must be voluntary; hence one who co-operates under fear of life or liberty is not an accomplice. The co-operation must be active; mere knowledge that a crime is to be committed is not generally sufficient to make the party an accomplice.

In People v. Coffey, 39 L. R. A. (N. S.) on page 707, the acts and facts which stamp a witness as an accomplice are given as follows:

> "Manifestly the single, sole determinative consideration is the part which the witness has borne in the crime perpetrated. If the witness has committed the crime, if he has knowingly aided and abetted in its commission, if he advised and encouraged its commission, the existence of any one of these facts admitted or established stamps his status as that of an accomplice."

Again in the same case in the same volume on page 710, the Court continues: "Wherever the commission of a crime involves the co-operation of two or more people, the guilt of each will be determined by the nature of that co-operation. Whenever the co-operation of the parties is a corrupt co-operation then always those agents are accomplices, even as at common law they were principals," and further on page 711, the Court says:

"This, then, is the true test and rule: If in any crime the participation of an individual has been criminally corrupt, he is an accomplice. If it has not been criminally corrupt, he is not an accomplice. In those cases where the concurrent act or co-operation of two people is necessary as in seduction, sometimes in abortion, and in the minor offenses of selling liquor, lottery tickets, or harmful drugs, the relationship of accomplice does not exist, because the co-operation of the other party is not denounced by law as criminally corrupt, and as a matter of fact need not be criminally corrupt."

See also *State v. Duff*, 144 Iowa 142; 122 N. W. 829

and the extensive note thereunder in 138 Am. St. Rep. page 270, giving definition of an accomplice and gen-

eral rule for determining who is an accomplice.

In the Duff case the court held that a prisoner is not an accomplice of a person outside the jail who assists him to escape.

In *United States v. Diggs*, 220 Fed. 545, it was held that women transported from one state to another for immoral purposes are not accomplices to the offense of transporting them and furnishing tickets for their transportation.

An inmate of a disorderly house was held not to be an accomplice with the keeper thereof. *State v. Stone* (Tex. Crim.) 85 S. W. 808.

An examination of the testimony and the contract or agreement entered into in this case, will demonstrate that the witnesses March and Hunter did not knowingly, voluntarily, and with a common intent unite with the defendant in the commission of the crime. Neither did they aid, assist, advise, or encourage in its commission, or act in concert with the defendant, or have any corrupt co-operation with the defendant in its commission.

They caught the fish in the trap, they waited for the promised boat of the defendant to come, and when it failed to come in time, the fish were wasted. The destruction of the fish was occasioned entirely by the failure and negligence of the defendant company, and it alone could be held liable and responsible for the violation of the law. Another consideration may be here presented. The testimony showed a clear violation of law, that a considerable number of salmon were wasted and destroyed on July 28, 1913,

at the trap in question. Who was liable therefor? Either the defendant corporation, or March and Hunter. In either case, the other would not be an accomplice of the party liable. They were on totally opposite sides, neither aiding or assisting or co-operating with the other. The indictment was against the defendant corporation, the facts were given to the jury, and a verdict was returned against the accused. There is no foundation, it seems to us, of the claim of the relationship of accomplice between the opposite sides. The witnesses March and Hunter can therefore withstand the test of the general rule to determine whether a witness is an accomplice to-wit: "Could the witness himself have been indicted for the same offense, either as principal or accessory."

State v. Duff, 144 Iowa 142; 122 N. W. 829.
State v. Jones, 115 Iowa 113; 88 N. W. 1066.
State v. Stone, 188 Ga. 705; 45 S. E. 630.
State v. Levering, 132 Ky. 666; 117 S. W. 253.

In such case, an instruction concerning the evidence of an accomplice would have been unwarranted and was properly refused.

Holmgren v. United States, 156 Fed. 444.
State v. Roberts, 15 Or. 197.

The further fact may be emphasized in this case that there was no error in refusing the instruction requested by the defendant to the effect that March and Hunter were accomplices of the defendant, for the reason that the instruction requested assumed by its language that they were accomplices, and was therefore an improper instruction to request.

The instruction requested is found on page 177

of the Transcript of Record, which was numbered as Defendant's Instruction No. 25, and in part is as follows. " * * * * * * then said two witnesses, William Hunter and Hayward March, are two accomplices of the defendant in said crime and you cannot find the defendant guilty on the testimony of such accomplices uncorroborated by any other evidence tending to connect the defendant with the commission of the crime."

Here is a clear assumption that the witnesses were accomplices, and as was held in *Holmgren v. United States*, 217 U. S. 523 it was not error to refuse an instruction which assumed a fact, and that is the general rule.

United States v. Dolan, 153 Fed. 52.

"WANTONLY" PROPERLY DEFINED.

A minor assignment of error is the objection to the definition given by the court of the word "wantonly" as the same appears in the statute. The Court's instruction concerning the same is as follows: "The word 'wantonly' as used in this statute means without excuse or justification; having a reckless disregard of consequences; heedless of results and the rights of others."

In *Strough vs. Central R. Co.* of New Jersey 209 Fed. 26, Judge Gray, as to the words "wanton" and "wilful," in cases of negligence says that the later authorities all agree that those words do not necessarily imply any purposeful design of the defendants to injure plaintiff, or in fact any one. They are applicable to all wilful conduct which is reckless of the

dangers that may ensue therefrom, and as to whether it was so was for the jury.

In *Cochin v. El Paso and S. W. R. Co.*, 108 Pac. 260 the following definition of "wanton" is given, as distinguished from "wilful":

> "An act is 'wilful where the resulting injury is intentional, or the natural and probable consequence of the act. The word 'wanton' is however, more comprehensive, and to constitute wantonness it is not essential that the injury should be intentional or the probable consequences of the wrongful act; it is sufficient that the act indicates a reckless disregard of the rights of others, a reckless indifference to the results, or that the injury is the likely and not improbable result of the wrongful act.
> The word 'wanton' does not mean 'wilful,' but reckless or heedless inattention to duty (*Kelly v. Stewart*, 93 Mo. App. 47).
>
> Any legal act is 'wanton' when it is needless for any rightful purpose without any adequate legal provocation and manifests a reckless indifference to the rights and interests of another.

State v. Brigham, 94 N. C. 888.
Hazle v. Railroad Co., 173 Fed. 431.
Natl. Folding Box Co. v. Robertson's Estate, 125 Fed. 524.
Cleveland C. C. & St. L. Ry. Co. v. Tartt, 64 Fed. 823.
Seago v. Paul Jones Realty Co., 170 S. W. 372.
Merrill v. Sheffield Co., 53 So. 219.
Adler v. Marit, 59 So. 597.
Vessel v. Seaboard Air Line Co., 62 So. 180.
Tolleson et al v. Southern Ry Co., 70 S. E. 311.
Cobb v. Bennett, 75 Pa. St. 326.
Welch v. Durand, 36 Conn. 182.

It will be seen that the definition given by the District Court went as far and was as complete and

comprehensive as the law requires, and that the error assigned is therefore without foundation.

For all the reasons herein given, that the indictment was sufficient, that there was no error in the election of the date of the commission of the crime, that the testimony of other violations of the law was proper to shed light on the whole situation, and to show motive ,intent, knowledge, purpose on the part of the defendant in the commission of the offense, that the defendant could not shift a duty resting upon it upon the witnesses for the government on the plea of independent contractors, and that said witnesses were not accomplices of the defendant, that the definition of wantonly was clearly sufficient, and finally because an inspection of the proceedings of the trial and the rulings and instructions of the Court will demonstrate that the defendant had a fair and impartial trial, the Government asks for an affirmance of the judgment rendered.

Respectfully submitted,

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